WILLIAM L. POTTER and CRAIG B. POTTER, Appellants	:	Docket No. IBIA 82-31-A
v.	:	Order Granting Motion to Dismiss
ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS), Appellee	:	July 28, 1982

ORDER

On May 7, 1982, the Board of Indian Appeals issued an order allowing appellants an opportunity to respond to a motion to dismiss filed by appellee. Appellants' response was received on June 1, 1982.

Appellants seek review of the denial of their application for allocation of grazing privileges on Range Unit 34 on the Rosebud Sioux Reservation in South Dakota. Appellee's motion to dismiss argues that the Board lacks jurisdiction to hear this appeal for two reasons. First, appellee contends that the decision to deny appellants' application was made by the tribe, not by the Bureau of Indian Affairs (BIA). The gist of this argument is that BIA served merely as an intermediary who informed appellants of the tribe's adverse decision, finding appellants ineligible for allocation. BIA, therefore, argues that no action has been taken in this case that is reviewable by the Board. Additionally, BIA argues that the basic issue in this case is a tribal enrollment dispute over which the Board has no jurisdiction under Departmental regulations found in 43 CFR 4.1(b)(2) and 4.330 and the Supreme Court's decision in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

Appellee's motion cannot be addressed without a review of the factual background of this case. On October 16, 1975, the Rosebud Sioux Tribal Council met and, among other business, considered tribal enrollment matters. The minutes of that meeting state:

> Robert LaPointe [tribal enrollment clerk] then informed the Council that he had a stack of other enrollments, with low degree of Rosebud Sioux Indian blood and had started to read some of them on the list as follows:
>
> PALMER, Kimberly Kay * * *
> PARKER, Robert Edward * * *
> POTTER, William Lee * * *
> POTTER, Craig B. * * *
> POTTER, Howard Hugh * * *
> POTTER, Chris A. ** *

> As this point, Robert LaPointe, stated that these were given to the Tribal Council already and made a motion to accept the above enrollments along with the others in this stack he was reading off. Seconded by Donald Knox. Accept as a package.
>
> Vote: 6 in favor 13 opposed 5 not voting
> Motion Carried. [1/]

The six individuals named in the minutes were given enrollment numbers by BIA. 2/ Appellants subsequently received allocations of grazing privileges as tribal members. 3/

On February 14, 1979, the Superintendent of the Rosebud Agency wrote the President of the tribe drawing his attention to the discrepancy between the vote tally and the conclusion that the motion to enroll appellants carried in the October 16, 1975, minutes. The Superintendent concluded that there was a typographical error in the minutes and requested that the Tribal Council review these enrollments under the criteria in effect in October 1975.

On February 26, 1981, the Tribal Council considered the Superintendent's request. The Council minutes for that meeting contain the following entry: "Matt War Bonnet moved to disenroll Kimberly Palmers through Chris A. Potter as listed and as voted on by previous Council. seconded by [Arley Bordeaux. VOTE 23 in favor 0 opposed 2 not voting Motion Carried.]" 4/

On October 13, 1981, the Superintendent of the Rosebud Agency wrote appellants, informing them that their application for grazing allocation had been denied. The BIA maintains that this decision was rendered by the Rosebud Sioux Tribal Council, not by BIA. The Superintendent's letter states in its entirety: "Your application for allocation of grazing privileges on Range Unit No. 34 has been denied by the Rosebud Sioux Tribal Council for the following reason: 'Does not meet enrollment requirement of the Rosebud Sioux Tribal Resolution # 81-85, II. C. 1.'" Review of this decision was denied

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1/ Rosebud Sioux Tribal Council minutes, Oct. 16, 1975, at 27-28 (hereinafter "1975 Tribal Council minutes").
2/ Letter from Superintendent, Rosebud Agency, BIA, to President, Rosebud Sioux Tribe, Feb. 14, 1979 (hereinafter "1979 letter").
3/ 1979 letter.
4/ Rosebud Sioux Tribal Council minutes, Feb. 26, 1981, at 9 (hereinafter "1981 Tribal Council minutes"). The bracketed material is from a corrected copy of the Tribal Council minutes submitted with appellants' response to appellee's motion to dismiss.

by the Aberdeen Area Director, BIA, 5/ and the Acting Deputy Assistant Secretary--Indian Affairs (Operations). 6/ In each instance, the letter denying review stated that appellants' exclusive remedy was with the Rosebud Sioux Tribe.

Appellants oppose the motion to dismiss on both factual and legal grounds. Appellants offer evidence indicating that the vote at the 1975 Council meeting was to enroll them in the tribe and that the 1981 Council acted under a mistake of fact as to what action the earlier Council had taken. This evidence, in the form of affidavits from the 1975 Tribal Council President, 7/ Secretary, 8/ and Enrollment Clerk, 9/ and of a petition signed by ten members of the 1975 Council, 10/ and present at the February 1981 Council meeting, indicates that the typographical error in the 1975 minutes had been in the vote tally, which should have read: "13 in favor 6 opposed." Furthermore, the discussion of the problem which occurred before the vote in the 1981 Council indicates that the Council, which intended to merely affirm the action taken by the 1975 Council, acted on the basis of the vote tally without any inquiry into where the error in the 1975 minutes had actually occurred. 11/

Appellants' legal argument is that BIA, by failing to inform them of the Superintendent's 1979 letter questioning their enrollment, deprived them of due process. The BIA's acquiescence in the tribe's decision to disenroll them and the fact that the October 16, 1981, letter from BIA is the only notification they have received that they were disenrolled are cited as further evidence of BIA involvement. Appellants argue that these actions are reviewable by the Department.

The BIA alleges, as it has throughout this proceeding, that appellant' exclusive remedy is with the tribe because no Federal action is involved. This position is consistent generally with prior decisions of this Board. In Stands Over Bull v. Area Director, 6 IBIA 98 (1977) (modified in Stands Over Bull v. Area Director, 6 IBIA 117 (1977)), the Board was asked to decide

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5/ Letter from Area Director, Aberdeen Area Office, BIA, to counsel for appellants, Dec. 3, 1981.

6/ Letter from Acting Deputy Assistant Secretary--Indian Affairs (Operations) to counsel for appellants, Jan. 21, 1982.

7/ See Appellants' Exh. BB.

8/ See Appellants' Exh. CC.

9/ See Appellants' Exh. DD.

10/ See Appellants' unlettered exhibit attached to notice of appeal of Dec. 23, 1981 (hereinafter "Unlettered Exhibit").

11/ See Memorandum from Rosebud Sioux Tribal Council Secretary to BIA Natural Resources, Mar. 5, 1981, and attached transcript of Rosebud Sioux Tribal Council meeting, Feb. 26, 1981.

among conflicting versions of actions taken by a tribal council and to determine which account of a reported vote was to be credited (a similar situation to that presented here). Finding that the controversy presented was one in which BIA and the Secretary of the Interior could not properly become involved, the Board held that it was without authority to interpret the conflicting evidence concerning the tribal action. Concluding that the Tribal Council alone was the arbiter of the actions of the Council, the Board's opinion concludes, in language relevant to this appeal, that: "We believe it is incumbent on the * * * Tribal Council, not the Bureau of Indian Affairs or this Board, to clear the air on the above controversy." 12/

Tribal enrollment disputes are regulated by the provisions of regulations published at 25 CFR Part 42, to the extent permitted by tribal governing bodies or the Congress. Appeals from enrollment decisions of the Rosebud Sioux Tribe to the Secretary are permitted under 25 CFR 42.3 and Rosebud Sioux Enrollment Ordinance R.B. 75-10 dated October 16, 1975, enacted pursuant to section 2, Article II, Rosebud Sioux Constitution, as amended. Section 2, Article II of the tribal constitution provides: "The Tribal Council shall have power to promulgate ordinances, subject to review by the Secretary of the Interior, covering future membership and the adoption of new members." 13/

Enrollment Ordinance RB 75-10 approved October 16, 1975, by the Rosebud Sioux Tribal council, provides in pertinent part at section V for Secretarial review of enrollment disputes:

> If the decision is adverse, the enrollee, or his representatives, shall have a right of appeal to the Secretary of the Interior by filing a Notice of Appeal with the Superintendent and a copy with the Secretary of the Tribe within thirty-days after receiving notice of the Tribal Councils adverse decision. The decision of the Secretary of the Interior on the appeal shall be final. [14/]

12/ Patrick Stands Over Bull v. Area Director, supra at 107.

13/ 25 CFR 42.2 provides:

"The regulations in this Part 42 are for the purpose of establishing the procedure for filing appeals in conjunction with the rejection of any name from a roll of an Indian tribe when final approval thereof rests within the purview of the Secretary either because of provisions in tribal constitutions or specific acts of Congress. The regulations are not to apply in those instances where the procedures for filing appeals by applicants rejected for tribal membership are prescribed in tribal documents."

14/ Although not addressed by any of the parties in the proceeding, it is possible that RB 75-10 provides appellants with an avenue of appeal to BIA. The extent, if any, to which BIA may be vested with enrollment review authority over the Rosebud Sioux Tribe (or in the case at issue) by virtue of RB 75-10 is for BIA to decide, not this Board. The Board is precluded by regulation from adjudicating tribal enrollment disputes. See 43 CFR 4.330(b).

As appellee points out in his brief, Departmental regulations published at 25 CFR Part 2 and 43 CFR 4.330 confer jurisdiction upon this Board over decisions of officials of BIA, not officials of the various tribes. Finally, as previously noted, 43 CFR 4.330(b) excludes tribal enrollment disputes from the delegation of authority given by the Secretary to this Board to act on his authority. Although appellants seek to characterize the matter differently, the ultimate question to which they seek an answer in their appeal is whether they are enrolled members of the Rosebud Sioux Tribe. It is beyond the authority of this Board to answer that question.

Appellee's motion to dismiss appeal is granted.

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Franklin D. Arness
Administrative Judge

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Wm. Philip Horton
Chief Administrative Judge

ADMINISTRATIVE JUDGE MUSKRAT DISSENTING:

The question before the Board is whether appellee (BIA) took any action in regard to the denial of appellants' application that renders that decision substantively reviewable by the Board. As the majority opinion states, BIA contends that appellants' exclusive remedy is with the tribe because no Federal (i.e., BIA) action is involved. The evidence in the record indicates that the decision to deny appellants' application was made by the Tribal Council and conveyed to appellants by BIA. This procedure would be proper under 25 CFR 151.10 if the land involved were tribal or tribally controlled Government land. 1/ Thus, it appears, based on the information before the Board, that the Tribal Council had the authority to decide whether or not to grant the allocation of grazing privileges on Range Unit 34, and that BIA served merely as an intermediary, informing appellants of the Council's adverse decision. 2/ Such a Federal role, though minimal and ministerial, is, nevertheless, still subject to administrative appeal and review by the Board. See 43 CFR 4.330(a)(1). 3/ Consequently, I dissent from the majority opinion that the Board does not have jurisdiction in this case and therefore I would deny appellee's motion to dismiss on grounds that no reviewable BIA action was involved in the denial of appellants' grazing privilege application.

In the alternative, appellee seeks dismissal on the grounds that this case is essentially an enrollment dispute over which the Board has no jurisdiction under Departmental regulations and the Supreme Court's decision in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Although the question of whether appellants were enrolled members of the tribe was central to the

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1/ The record, however, does not clearly disclose the status of this land. For purposes of this dissent, it is assumed that the procedure followed by BIA was properly authorized.

2/ Even if BIA did have a substantive role in reaching the decision regarding the appellant's application, BIA was required according to 25 CFR 151.10 to make that decision in accordance with Tribal Resolution #81-85, II C. 1, which requires tribal membership as a condition for the approval of a grazing privilege. According to the information available to BIA at the time, appellants were not members of the tribe when their application was being considered. Therefore, BIA would have been required in any event to deny their application.

3/ 43 CFR § 4.330(a)(1) states in pertinent part:

"Appeals to the Board of Indian Appeals from Administrative Actions of Officials of the Bureau of Indian Affairs: Administrative Review in Other Indian Matters Not Relating to Probate Proceedings

"§ 4.330 Scope,

"(a) * * * These regulations apply to the practice and procedure for (1) appeal to the Board of Indian Appeals from administrative actions or decisions of officials of the Bureau of Indian Affairs issued under regulations in Chapter I of 25 CFR, in cases involving determinations, findings and orders protested as a violation of a right or privilege of the appellant; * * * ."

denial of appellants' application, nevertheless, it is not proper to characterize this case as a tribal enrollment dispute over which the Board lacks jurisdiction. Appellants' enrollment status is merely one fact relied upon in reaching a decision regarding the awarding of the grazing privilege. The administrative action on appeal in the instant case is BIA's actions involving the denial of appellants' application for allocation of grazing privileges on Range Unit 34. Because the tribe and not BIA determines the fact of tribal enrollment, it is not a fact at issue before the Board in this appeal. This appeal, therefore, is not a tribal enrollment dispute as the majority holds, but rather it concerns reviewable actions of BIA.

With regard to the issue properly before the Board, i.e., BIA's intermediary role between the tribal decisionmakers and the appellant applicants, I believe BIA conducted itself properly and in conformity with whatever due process requirements the circumstances demanded. As trustee for Indian tribes and individuals, the United States and its agent, BIA, are bound by principles of guardianship and pertinent constitutional restrictions (especially due process considerations). St. Pierre v. Commissioner of Indian Affairs, 9 IBIA 203, 89 I.D. 132 (1982). Accordingly, I would hold BIA's actions in this case complied with its trust responsibilities (including those of due process) and would thus deny appellants' appeal.

However, I would further hold that when BIA has information in its possession indicating that an enrollment decision is incorrect, ambiguous, or is based on incorrect facts or a mistake of law, BIA is obligated by its trust responsibility to inform the tribe of the problem and to seek clarification or correction of the individual's enrollment status. In the instant case, BIA did this when it initially requested clarification of the apparent discrepancy between the vote tally regarding appellants' enrollment and the conclusion that they were enrolled. With the appellants' introduction of new evidence regarding the fact of enrollment, BIA is now in a similar situation and should be required to submit this information to the Tribal Council and seek clarification of the enrollment status of appellants and those who were voted upon at the same time, including those who were not named in the Tribal Council minutes.

Accordingly, I respectfully dissent from the majority's ruling that the Board lacks jurisdiction in this case. I would rule that the Board has jurisdiction under 43 CFR 4.330(a)(1).

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Jerry Muskrat
Administrative Judge